Supreme Court, U.S.
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No. : 05-217

In the

Supreme Court of the United States

DJM, LIMITED,

Petitioner,

-against-

ISLAND YACHTING MANAGEMENT, INC., *Formerly* ISLAND YACHTING CENTRE, INC.; ISLAND YACHTING CENTRE, LLC, WILL DITMER; AND IAN JARMAN

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Where acts or omissions cause both direct and consequential damages, and where no claims are made for direct damages because they were previously voluntarily satisfied, are claims for consequential damages which are made, properly dismissible pursuant to FRCP 56, because the direct damages have been compensated for?

2. Under federal maritime law, is loss of use of a private pleasure boat a compensable item of damage?

LIST OF PARTIES

The parties to the proceeding are as shown in the caption:

Petitioner: DJM, Limited is a Delaware corporation. (no parent; no subsidiaries)

Respondents: Island Yachting Management, Inc., *Formerly* Island Yachting Centre, Inc.; Island Yachting Centre, LLC; Will Ditmer; and Ian Jarman, are Florida corporations, a Florida limited liability company & Florida residents.

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OPINION BELOW

The Order of the United States District Court for the Middle District of Florida entered March 23, 2004, granting Respondents summary judgment is unreported (1a). The Decision of the Eleventh Circuit, affirming without opinion, is unreported officially, but reported at 132 Fed. Appx. 246 (14a).

JURISDICTION

The judgment sought to be reviewed was entered on May 17, 2005 (17a).

This court's jurisdiction is invoked pursuant to 28 U.S.C. 1254 (l).

This Petition is timely filed within 90 days of the denial by the Eleventh Circuit on June 24, 2005 of Petitioner's Petition for a re-hearing (19a).

LAW INVOLVED

STATUTES

Uniform Commercial Code
Fla. Stat. 672.313. Express Warranties by affirmation, promise, description sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain

creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Fla. Stat. 672.314. Implied Warranty: merchantability: usage of trade.

(1) Unless excluded of modified (s. 672.316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

Fla. Stat. 672.315. Implied Warranty; fitness for particular purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

Fla. Stat. 672.714. Buyer's damages for breach in regard to accepted goods.

(1) Where the buyer has accepted goods and given notification (s.672.607{3}) he or she may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is

reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

Fla. Stat. 672.715. Buyer's incidental and consequential damages.

(1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expenses incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include:

(a) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) Injury to person or property proximately resulting from any breach of warranty.

Restatement II of Torts, Section 928

Harm to Chattels

When one is entitled to judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for

(a) the difference between the value of the chattel before the harm and the value after the harm or, at his election in an appropriate case, the reasonable cost of repair or restoration, with due allowance for any difference between the original value and the value after repairs, and

(b) the loss of use.

STATEMENT OF THE CASE

The Eleventh Circuit affirmed without opinion the district court's order granting Respondents summary judgment dismissing five of six causes of action in Petitioner's complaint which claims damages only of loss of use, diminution in value, and physical damage to a sailboat bought by Petitioner from Respondents. The complaint alleges breach of warranty and tort resulting in consequential damages. The district court held that because the correction of all defects which resulted in the claims sued on were paid for by others on Petitioner's behalf, Petitioner sustained no damages and thus failed to state a claim even though the complaint sought no damages for the cost of correcting the defects. Of the consequential damages for which Petitioner *did* seek compensation, the district court held that loss of use of a boat owned strictly for pleasure is not a compensable item of damage in Admiralty. The court never mentioned the remaining claims for diminution in value or physical damages extant in the boat. In so holding the Eleventh Circuit's decision directly conflicts with a contrary holding of

this court[1], and decides important questions of federal law that have not been, but should be, settled by this court.

FACTS

On January 11, 2000, Respondents, dealers in sailboats, transferred title to and delivered to Petitioner, and were paid by Petitioner for, a new sailboat. Respondents ordered the boat to be constructed by Island Packet Yachts in Florida. Upon completion and delivery to Respondents, in Florida, they took the title to the boat and pursuant to their contract with Petitioner's principal, John P. D'Ambrosio, commissioned the boat. The contract neither provided for, nor excluded or modified any warranties. Accordingly, by operation of law, Respondents gave Petitioner warranties under the Uniform Commercial Code, both implied and express; the latter by virtue of a written Dealer Commissioning Checklist (21a), signed and initialed by Respondent Will Ditmer.

Starting immediately upon delivery of the boat and continuing for the next 2 years many serious defects surfaced (1a - Facts), none of which were corrected by Respondents. Almost all the defects were corrected by the efforts of the Petitioner in the first instance which had to find a facility to do the work, pay for repairs, and submit bills to the manufacturer for reimbursement, pursuant to the latter's written limited warranty, whose benefit did not extend to Respondents and which excluded consequential damages.

This caused loss of use of the boat every time it had to

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[1] The Conqueror, 166 U.S. 110, 17 S. Ct. 510, 41 L.Ed. 937 (1897)

be repaired, and resulted in a new boat whose value diminished with each subsequent repair. The cumulative loss of use amounted to 180 days, during the first two years. The repairs themselves resulted in physical damage to the boat which still exists. The record contains proof of Petitioner's special damages in the aggregate amount of $84,349.00.

PROCEDURAL HISTORY

Petitioner sued Respondents only for those consequential damages, in the United States District Court for the Middle District of Florida pursuant to the court's Admiralty jurisdiction and in diversity. (28 U.S.C. Sections 1333 (l), and 1332 (a)). The first five claims were in negligence, fraudulent misrepresentation, breach of warranties, deceptive and unfair trade practices, and strict liability. The sixth claim was in quasi contract for money owed to repair the boat's air conditioning for $1,669.99. It was tried, resulting in a defendant's verdict and is not here under review.

Before filing an answer, Respondents moved to dismiss the complaint pursuant to FRCP 12(b)(1) for lack of jurisdiction over the subject matter. In May 2003, the court, Hon. John E. Steele, U.S.D.J, denied the motion and upheld both admiralty and diversity jurisdiction.

Upon completion of discovery, Respondents moved for summary judgment, contending that since the boat was usable, except when it was being repaired, and since all repairs were made and paid for by the manufacturer, Petitioner had sustained no damages. The court, Hon. Sheri Polster Chappell, U.S.M.J., agreed and dismissed the first five claims.

Upon receiving Respondent's motion, Petitioner

cross-moved for partial summary judgment for liability under FRCP 56(c). To prove its claims for loss of use, diminution in value and physical damage to the boat, Petitioner submitted four affidavits and 50 documents attesting to the defects and time lost, including opinions of a marine surveyor as to the diminished value and of a charterer of sailboats as to charter costs. Although Respondents offered no affidavits in response, the court ruled as it did, never directly addressed Petitioner's cross motion, and never addressed the claims for diminution in value or the subsisting physical damage. As to loss of use, the court held that federal maritime law will not compensate for the loss of use of a private pleasure boat.

The Eleventh Circuit Court of Appeals affirmed without opinion.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW PRESENTS IMPORTANT, UNSETTLED QUESTIONS OF FEDERAL LAW, AND CONFLICTS WITH U.S. SUPREME COURT AND STATUTORY LAW

a) Summary Judgment

FRCP Rule 56(a), by its very terms, is concerned with a party's "claim, counterclaim, or cross-claim". The district court granted Respondents summary judgment because it found that Petitioner suffered no damages because "all of the alleged defects were repaired by the manufacturer at the manufacturer's expense" (8a). That holding might be germane if those were the damages Petitioner sued for. However, they are not. It is

a classic non-sequitur. While this court encouraged the federal courts to make better use of summary judgment in disposing of claims where there was no reasonable expectation that a rational trier of fact could find for the non-moving party[2], the decision below takes the Rule into the realm of the surreal since the court below dismissed Petitioner's claims for consequential damages having mistaken them for a claim which was never made for direct damages, i.e., the cost of repairs.

The court below used summary judgment in a way never authorized by Rule 56 or this court. The district court decided the case as if it were faced with a Rule 12(b)(6) motion for failure to state a claim. In so doing it created a claim never pleaded by Petitioner, then decided it as if it were being tried, dismissing out of hand a multitude of factual questions raised by Petitioner which should have gone to trial. This rested on no precedent or history.

Petitioner suggests that this court could never have intended such an approach or result on a motion for summary judgment and a cross-motion for partial summary judgment.

b) Consequential Damages

Respondents' case, validated by the courts below, is that since defects were corrected, Petitioner was made whole.

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[2] In a trilogy, Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed. 2d 538 (1986); Cellotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986); and Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed. 2d 202 (1986), the United States Supreme Court clarified the criteria to be applied by the District and Circuit Courts in summary judgment motions. In Matsushita, at p. 1356, *supra*, the court went further than any prior case in holding that a court can evaluate the plausibility of evidence.

However, Petitioner's case has nothing to do with the cost of fixing defects but only their number, the amount of time it took to fix them, and their aftermath - loss of use of the boat, its diminution in value and physical damage - all of which should have been avoided entirely had Respondents done the things they were paid to do in commissioning the boat, and had they found and corrected the defects before Petitioner had to do so on its own time when it should have been enjoying the boat, which was the only reason it was bought in the first place. The proof in the record is that of 53 items which Respondents represented they had properly inspected, installed, and checked, as evidenced by The Dealer Commissioning Checklist (21a), half failed. Most of those that failed, especially the most serious, failed within the first two months after delivery.

Respondents' defaults resulted in their breach of U.C.C. warranties which arose from the sale pursuant to Fla. Stat. Sections 672.313, 672.314, and 672.315, both express and implied. Each time a defect surfaced, Respondents breached their warranty as to that item, damaging Petitioner as follows: 1) The item needed to be repaired or replaced, 2) Petitioner lost the use of the boat pending repairs, 3) the boat depreciated on account of the repairs, and 4) it remained physically damaged. Fla. Stat. 672.714 authorizes the cost of repairs and diminution in value. Fla. Stat. 672.715 authorizes consequential damages for loss of use. See: *Miles v. Kavanaugh*, 350 So.2d. 1090 (Fla. 3rd DCA, 1977).

Just as in the case of breaches of warranties, the same categories of damages, direct and consequential, are recoverable in Florida when they arise on account of tort. Florida has adopted the *Restatement II of Torts*, Sections 928, 931; See: *AT&T Corp. v. Lanzo Const. Co., Florida*, 747 F.Supp. 2nd 1223 (SD Fl 1999).

As in Florida, every other state's law allows recovery for consequential damages to chattels, whether due to tort or breach of warranty; whether in state or federal court. See: Buyer's Incidental & Consequential Damages from Seller's Breach Under U.C.C. Section 2-715, 96 A.L.R. 3rd 299 (1979); Commercial Damages, Charles L. Knapp, 2005, Vol. 2, Page 35B-41, Consequential Damages; Restatement II of Torts, *supra.*

Of the three kinds of consequential damages claimed by Petitioner, the district court decided only one, loss of use, (12a). It neither discussed nor specifically decided the other two, diminution in value and physical damage caused by the repairs. It nevertheless dismissed all three.

c) Loss of Use

Included in every state's law as a consequential damage is loss of use of the chattel. See: 96 A.L.R. 3rd 299, *supra*, at p. 362. B. consequential losses, Section 13, Loss of Use (1979); *Recovery for Loss of Use of a Motor Vehicle Damaged or Destroyed*, 18 A.L.R. 3rd 497, 537, Section 15 (1968); Knapp, *Commercial Damages*, *supra,* which states at paragraph 35 B.06(3)ii, "One of the most common types of consequential damages is loss of use."[3]

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[3]Jerry Alderman Ford Sales, Inc. v. Bailey, 291 N.E.2d 92, 12 U.C.C. Rep. Serv. 47, *modified and reh'g denied by* 294 N.E.2d 617, 12 U.C.C. Rep. Serv. 442 (Ind. Ct. App. 1973). *See also* Aries v. Palmer Johnson, Inc., 735 P.2d 1373, 4 U.C.C. Rep. Serv. 2d 85 (Ariz. Ct. App. 1987) (loss of use measured by reasonable rental value of $1,000 per day for a total of $100,000); Audlee v. New England Tank Indus. Of New Hampshire, Inc., 1985 US. Dist. LEXIS 12400, at *16 (D. Mass. 1985). (loss of use of tank awarded as consequential damage in case involving the explosion and fire at a jet aircraft fuel storage facility).

In *Jerry Alderman Ford Sales, Inc. v. Bailey*, 291 N.E.2d 92, the court held:

> Thus to restrict the measure of damages to a difference in market value is to ignore that the right to use property is perhaps the most important incident of its ownership.

The cases in Florida are representative of the uniformity of the cases throughout the country, whether in state court or federal court applying state law, and regardless of the kind of property or basis for the claim. Given liability, loss of use is recoverable. *Alonso v. Fernandez*, 379 So.2d 685 (Fl. 3rd DCA 1980) (private automobile); *Airtech Service, Inc. v. MacDonald Construction Co.*, 150 So.2d 465 (Fl. 3rd DCA 1963) (airplane); *Badillo v. Hill*, 570 So.2d 1067 (Fl. 5th DCA 1990) (private automobile); *Miles v. Kavanaugh*, 350 So.2d 1090 (Fl.3rd DCA 1977) (misrepresentation and breach of warranty) (airplane); *Finkel v. Challenger Marine Corp.*, 316 F. Supp. 549 (SD Fl. 1970) (private pleasure yacht); *Maserati Automobiles Inc. v. Caplan*, 522 So.2d 993 (Fl 3rd DCA 1988) (breach of warranty); *AT&T Corp v. Lanzo Const. Co, Florida*, 747 F. Supp.2d 1223 (SD Fl, 1999) (Fiberoptic cable); *Cochran v. Roscioli Yacht Sales, Inc.*, 642 So.2d 1106 (Fl 4th DCA 1994) (53 foot private pleasure yacht); *Meakin v. Drier*, 209 So.2d 252 (Fl.2d DCA 1968) (private automobile).

In *MCI Worldcom Network Services Inc. v. Mastec, Inc.*, 370 F.3rd 1074 (11th Cir. 2004), the court, in a suit to recover damages for loss of use of a fiber-optic cable, began its discussion as follows at p. 1076:

> Under Florida law, loss of use damages are available for an individual or entity whose

> chattel has been damaged by another party. *Meakin v. Drier*, 209 So.2d 252, 254 (Fl.2d Dist. Ct. App. 1968).

In the case at bar,(12a), the district court held as follows:

> The Plaintiff claims $50,000 in damages for loss of use while the boat was out of service for repairs. It is well settled that demurrage (loss of profits) "will only be allowed when the profits have actually been or may reasonably supposed to have been lost and the amount of such profits is proven with reasonable certainty." *Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.* 206 F.3d 1373, 1376 (11th Cir. 2000). "It is not the mere fact that a vessel is detained that entitles the owner to demurrage." *Id.* There must be a pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purpose of pleasure. *Id.*

When contrasted with the district court's holding in the case at bar, *MCI, supra*, highlights the reason why Petitioner asks this court to grant certiorari. *MCI* was decided in May, 2004. In May 2005 the 11th Circuit affirmed, without opinion, the district court's dismissal, summarily, as a matter of law, of Petitioner's claim for loss of use. In the cross motion for partial summary judgment the claim was supported by voluminous evidence of the loss, and the value thereof, using the very principles authorized by *Meakin v. Drier, supra*; the rental value of the exact boat owned by Petitioner, based on the opinion, in the record, of a boat charter company president, in the same locale, for the exact time periods claimed by Petitioner. Petitioner's proof went unopposed. Why was

Petitioner's claim dismissed and MCI's claim allowed?[4] Because the courts below felt themselves constrained to apply the one exception to the uniform "loss of use" rule - the exception which arises in federal courts sitting in Admiralty applying federal maritime law to the loss of use by an owner of a private recreational boat. The rationale was amply elucidated by the Eleventh Circuit in *Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.*, 206 F.3rd 1373 (11th Cir. 2000) cited by the district court below in its decision (12a).

The exception is based on the federal courts' understanding of federal maritime law, applied by federal courts only to private recreational boats. It takes several forms, all illogical, all draconian, all mistaken. One form is that which is articulated by the district court in its decision, quoting from *Central State, supra;* where the court below wrote (12a):

> 'It is not the mere fact that a vessel is detained that entitles its owner to demurrage.' There must be a pecuniary loss and not a mere inconvenience arising from an inability to use the vessel for the purpose of pleasure.

Its most extreme form was articulated by the court in *Oppen v. Aetna Insurance Co.*, 485 F.2d 252 (9th Cir. 1973). The court held:

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[4] The U.S. District Court for the Southern District of Florida dismissed MCI's case for loss of use based on failure to prove damages. The Eleventh Circuit certified the questions of the quantum of damage claimed by MCI to the Florida Supreme Court which has not rendered an opinion as of this writing. Supreme Court of Florida Docket Number SC04-948.

> Under federal maritime law loss of use of a private pleasure boat is not a compensable item of damage. *Id.* at p. 257.

The *Oppen* court attributed its holding to a now 108 year old case: *The Conqueror*, 166 U.S. 110, 17 S.Ct. 510, 41 L.Ed. 937 (1897). The route from *The Conqueror* to *Oppen* to the Petitioner's case has been a long one. Petitioner suggests that *Oppen* and like cases both before and after *Oppen* are evidence of an unintended consequence of *The Conqueror*.

It is only in the last 50 years or so that the federal courts which have dealt with the unique circumstances of loss of use by the owner of a boat bought solely for pleasure, have made their way to *Oppen* and *Central State* and the cases cited by the latter case at pp 1376, 1377. Along the way they ran hard aground. In *Snavely v. Lang*, 592 F.2d 296 (6th Cir. 1979) for example, the court describes the rule of The Conqueror as "...ironclad..." *Id.* at p. 298.

This court is respectfully asked to note just how ironclad the rule is. No matter the proof, no matter the extent of the loss of use, unless a private pleasure boat can prove loss of profits commercial in nature, its owner has no standing to recover damages for loss of use; damages available to all others, in all other courts. *Snavely*, *supra*, calls it, "The rule against demurrage for pleasure boats..." *Id.* at p. 299. Petitioner suggests it is a rule which stands the law on its head.

However, it was not always so. In 1918, Learned Hand, then a district judge in the Southern District of New York, in his decision in *The Vanadis* 250 F. 1010, upheld a claim for loss of use of a private yacht. There, he referred with approval to the 2nd Circuit decision in *The Eros* 251 Fed. 45, 163 C.C.A.

295 (2nd Cir. 1918). In *The Vanadis*, Judge Hand specifically recognized the efficacy of a claim for "loss of recreation." With prescience, he understood the value of the use of a boat as an item of pleasure and the loss of that pleasure as a compensable item of damage, now taken for granted by the laws of every state involving all manner of things from airplanes, to boats, to cars and cables. He also correctly assessed *The Conqueror* and its holding as follows:

> On principle it seems to me impossible that we should draw any distinction between yachts and any other property capable of use only as a means of recreation or pleasure. Nobody has any hesitation about such as are consumable, like wines, or flowers, or perfumes, or tobacco. It would be a fatuous defense against an action for injuries to such as these to prove that the owner would certainly have consumed them himself. Furthermore, if the defendant had wrongfully destroyed a yacht or motorcar, he would be hardier than most, were he to offer to show that the owner was bound not to sell or to let it. Yet surely, there can be no distinction, at least it would seem so, between the loss of a part of the recreation derivable from such property and the loss of the whole. All of them in the end are consumable, and the difference is only in the extent of the loss.
>
> But it is urged that the contrary is established in The Conqueror, 166 U.S. 110, 17 Sup.Ct. 510, 41 L.Ed. 937. I must concede that some of the language in that case, broken from its context, lends itself to that conclusion, but the decision

> involved nothing of the kind. It turned upon the dubiousness of the proof of value of the yacht. Doubtless that is a necessary condition of damages, here as elsewhere. We are all accustomed to the purchase and sale of pleasures and recreation, whether they be embodied in the use of things, like this, or in entertainment, like the stage. They have an exchange value, like the uses of any other parts of the appropriable world, which answer our native dispositions. The test is, as in every other case, their value in exchange, for the purpose of the recovery is to effect the result of an exchange. I see no reason to think that, if the exchange value of the yacht's use in The Conqueror, *supra*, had been established in a customary way, the libelant would have had further difficulty in his recovery.

In 1932, Justice Cardozo took the same measure of *The Conqueror* in his decision in *Brooklyn Eastern District Terminal v. United States*, 287 U.S. 170, 53 S.Ct. 103, 77 L.Ed. 240, albeit by way of dicta, where he agreed that loss of use of a private pleasure boat is a compensable item of damage. The court referred to cases from the early part of the 20th Century when loss of use of a boat was held compensable "...if there has been a *substantial impairment* of that enjoyment for which such vessels are maintained." 287 U.S. at p. 175. (Emphasis added). Justice Cardozo pointed out that The Conqueror did not hold that loss of use of enjoyment is per se not compensable, only that it must be a "substantial disturbance of enjoyment," properly proved, in order to warrant damages. 287 U.S. at p. 175.

The Conqueror did not establish the draconian proposition attributed to it by the recent cases. It requires a very careful reading. It mixes holding and dicta indiscriminately. Its essence, however, is that it found Mr. Vanderbilt's evidence insufficient to prove that he was damaged when his "... seagoing, schooner-rigged, screw steamship,182 ½ feet long, nearly 25 feet wide, and of 372 tons burden", 17 S. Ct. 510, 512 was detained over the winter when it was ordinarily not used. Mr. Justice Brown, writing for the court, opined that "...a mere inconvenience arising from an inability to use the vessel for the purposes of pleasure," did not entitle the owner to demurrage. However, the court continued: "In other words, there must be a loss of profits in its commercial sense." Id. at p.519. This latter rested on no precedent or history. It does not comport with the current law of loss of use. It is not the holding of the case.

Otherwise the court, in principal, speaks in terms whereby it acknowledges the value of loss of use of the Vanderbilt yacht. The court observed that: "The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market." *Id.* at p. 516. However, Mr. Vanderbilt's boat was not of a class regularly chartered.

Petitioner suggests that Judge Hand's and Justice Cardozo's assessments of *The Conqueror* are correct. Coincidentally, Petitioner's boat did belong to a class of vessels regularly chartered in Florida whose loss of use can be accurately computed.

d) Lack of Clarity

This case presents the important unanswered question of whether the owner of a private boat, bought solely for recreation, which never earns money commercially, should be summarily denied the benefits of the laws applicable to *every other kind of chattel*, by virtue of its involvement in a lawsuit where the applicable law is maritime in nature and the forum is the federal court.

The choice of forum is not always up to the vessel owner; nor is the choice of law. A collision, or allision, or an accident on navigable waters will often mandate the application of admiralty law despite the vessel owner's desires. See: *Mink v. Genmar Industries, Inc.* 29 F.3rd 1543, 1546 (11th Cir. 1994).

The *complete* departure by federal courts sitting in admiralty on cases involving private boats from the uniform loss of use law of all other jurisdictions is an anomaly. It is not supported either by precedent or by history. It dismisses out of hand the benefits of the law of contracts since a warranty is essentially a contract, *Filley v. Pope*, 115 U.S. 213, 6 S.Ct. 19, 29 L.Ed. 372 (1885), *Sanders v. Munson*, 74 F. 649, 651, 20 C.C.A. 581 (2nd Cir. 1896), whose breach entails damages for loss of use, even if the yacht is used for pleasure only. *The Eros, supra*, 251 F. 45, 47. It dismisses as well, damages in tort. Restatement II of Torts, Section 928; *AT&T Corp., supra*.

It singles out the American pleasure boating community for deprivation of the benefits of the law. It is unfair to that community which, according to the latest statistics compiled by the National Marine Manufacturers Association, numbered 12.8 million boats registered in the United States in 2003, from outboard powered rowboats and dinghies, to megayachts (28a).

At the turn of the last century only Vanderbilts and their

peers owned private boats. That has changed. So should the law. This court has not directly visited this area of the law since *The Conqueror*. Petitioner suggests that the mischief created during the intervening 108 years by the mistaken interpretation of that case should be set aright at this time. The lack of clarity engendered by The Conqueror has been the subject of continuing controversy on the part of both judges and lawyers who fault the illogical imposition of a hard case which resulted in bad law on innocent litigants unjustly deprived of rightful damages. See: *Nordasilla Corporation v. Norfolk Shipbuilding & Drydock Corporation*, 1982 A.M.C. 99 (E.D.Va. 1981):

> Also, while the arguments against speculative damages may have some merit, a rule of law which allows no damages for loss of use for a pleasure craft, no matter what its nature and no matter what the length of time, appears on the surface to be draconian. *Id.* at p. 106.

Courts which have expressed reservations about the soundness of the interpretation given to *The Conqueror* have, by and large, felt constrained, nevertheless, to defer to it. The *Oppen, supra*, court, faced with a contention that *The Conqueror* was not the beacon it has been purported to be, and should limit its application accordingly, held:

> In our view it takes a new and contrary holding of the Supreme Court before we are relieved of our obligation to follow previous holdings of that Court. *Id.* at 485 F.2d 257, F.N. 12.

Given the lack of clarity as to exactly what *The Conqueror* held, and given the injustice of requiring the owner of a boat

bought solely for recreation, which never has and never will earn income or profit, to have to prove loss of profit of a commercial nature before being able to be compensated for its loss of use, Petitioner respectfully strongly urges this court to accept the invitation extended by the 9th Circuit in *Oppen*.

This court should take a new look at the law properly applicable to this case and others like it. Only this Court can redirect American admiralty law and federal courts which apply it, into the mainstream regarding consequential damages for loss of use of private recreational boats, from which both have strayed.

Petitioner respectfully suggests it should do so for the sake of justice.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court of the United States grant review of this matter.

Respectfully Submitted
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Filed Mar. 23, 2004

DJM, LIMITED, Case No. 2:02-cv-617 FM-SPC
Plaintiff,

-vs-

ISLAND YACHTING MANAGEMENT, INC., formerly ISLAND YACHTING CENTRE, INC., ISLAND YACHTING CENTRE, LLC, WILL DITMER and IAN JARMAN,

Defendants.

ORDER

This matter comes before the Court on Defendant Island Yachting Management, Inc.'s Motion for Summary Judgment (Doc. # 62-1) filed on January 14, 2004, and Plaintiff DJM Limited's Cross Motion for Summary Judgment and Opposition to Defendant's Motion for Summary Judgment (Doc. # 64-1) filed on January 23, 2004. Both parties have filed responses to the respective Motions for Summary Judgment and the Motions are now ripe for review.

FACTS

On June 26, 1999, the Plaintiff purchased a new sailboat, an Island Packet Yacht 320 (Boat), from Island Yachting Management, Inc. (Island Yachting) for approximately $197,000.00, which included outfitting and commissioning. The manufacturer has not been named as a defendant in this case.

The Plaintiff and his son in law, who flew in from New London, Connecticut to aid the Plaintiff in sailing the Boat to Marco Island, were scheduled to take delivery on November 29, 1999. However, when they arrived there were still several systems that needed to be installed. The Plaintiff also requested that several changes be made to Boat's systems. Because the Boat was not ready for delivery on that date, the Defendant reimbursed the Plaintiff's son in law for his travel expenses. The Boat was finally delivered to the Plaintiff, Mr. John D'Amborsio, the Principal in DJM, Limited, on January 11, 2000.

Before each boat is delivered to the new owner the Manufacturer requires the seller to complete a dealer commissioning checklist. The commissioning checklist is a basic list ensuring that all of the Boats basic components, electronics, and rigging have been checked and that the new owner has been oriented to all the onboard systems. Will Dittmer, a sales associate for Island Yachting, completed the Manufacturer's commissioning checklist. Dittmer stated that while he did not personally check each item on the list he did verify with his initials that each task was complete. When the Boat was delivered, the Plaintiff was taken on a "shake down" cruise to orient the Plaintiff with the Boat's operating systems.

Since taking delivery of the Boat, the Plaintiff has taken numerous overnight trips including a week to ten (10) day trip sailing in and around Pine Island Sound and in the Spring of 2003, the Plaintiff sailed the Boat to the Florida Keys. However, the Plaintiff alleges that the Boat had a number of defects that caused the Boat to be unseaworthy. For example, upon delivery, the top of the main mast was bent a ft and to the right above the spreader. The Plaintiff also alleges that the air conditioner which was supplied by Marine Air Systems and installed by Sea Hag Yacht Systems had rusted, the hatch

leaked, the GPS system did not function, the roller furler failed to operate correctly, there was a whining in the drive train and the prop shaft, and a defective and leaking hose connector running from the hot water heater caused water damage.

On March 17, 2000, the Plaintiff spoke with Robert K. Wardwell, an employee of Marco River Marine, about some of his concerns with the Boat. Wardwell inspected the Boat on March 21, 2000 and on March 22, 2000. Wardwell and the Plaintiff motored the Boat to Marco River Marine where Wardwell hauled the Boat and began removing the prop and the related stem tube. Wardwell discovered that the cutlass bearing inside the stern tube was too small for the stern tube and contacted Mr. Tom Broome at Island Packet yachts (Maufacturer). Waldwell told Broome some of the problems that the Plaintiff was experiencing. Broome told Wardwell that the mast was bent because the tension on the backstays was too great and the problem was corrected. On March 27, 2000, Broome sent Wardwell a new stern tube and cutlass bearing which he then installed. On March 30, 2000, Wardwell inspected the rudder and found that the rudder would not turn as far to the right as it would to the left. Upon further inspection, Wardwell found a piece of wood glued near the steering mechanism that was blocking the steering mechanisms ability to fully turn to the right. Wardwell removed the obstruction and readjusted the steering and auto pilot. On March 30, 2000, the Boat was refloated and on March 31, 2000, a crew was sent from Seco South by the Manufacturer to replace and re-rig the mast. On April 4, 2000, Ken Brown from Seco South returned and began repairs to the roller furling unit which were completed on April 7, 2000.

In mid April 2000, the whine in the drive train or a similar noise returned. On April 13, 2000, marina personnel tested the Boat. They trimmed the propeller and the noise was

eliminated. In September of 2000, the Plaintiff asked Wardwell to look at his GPS system. Wardwell found that the GPS system had not been connected and he connected it. Later in October of 2000, the GPS system failed and Wardwell installed a new BNC connector (GPS antenna connection) and reconnected the GPS system. On March 16, 2001, Wardwell repaired a freshwater hose that someone had drilled a hole in which allowed water to drain into one of the Boat's lockers. On February 20, 2002, the Plaintiff had Wardwell replace the Boat's water heater because of some leaks created by a faulty hose connector which had caused the water heater to rust. All of the Plaintiff's repairs costs were either paid or reimbursed by the Manufacturer.

On July 31, 2001, the Plaintiff informed the Defendant that the Boat's air conditioning system was rusting. The Plaintiff alleged that rust damage to the Boat's air conditioning system was cause by the Defendant because of improper installation of the air conditioner unit. The air conditioning unit was originally installed by Sea Hag Systems. The Plaintiff did not approve of the original installation and requested that the Defendant install the unit in another location. The Defendant made the modifications according to the Plaintiff's specifications. However, the manual used for installing the air conditioner states that the condensation hose leading from the drain pan should be attached directly to a sealed sump pump and drained directly out of the boat. The condensation hose was installed without a sump pump and instead led directly to the boat's bilge water and then indirectly was pumped out of the boat. Marine Air denies liability stating that the drain pan and braces supporting the air conditioner rusted because of the improper installation of the condensation drain hose. To date no one has paid for the repairs to the Boat's air conditioning unit which totaled $1669.99. As a result, the Plaintiff filed the present action.

SUMMARY JUDGMENT STANDARD OF REVIEW

Summary Judgment is appropriate only when the Court is satisfied that "there is no genuine issue as to any material fact" and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56c). An issue is genuine if there is sufficient evidence such that a reasonable jury could return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Similarly, an issue is material if it may affect the outcome of the suit under governing law. *Id.*

The moving party bears the burden of showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). In deciding whether the moving party has met this initial burden, the Court must review the record and all reasonable inferences drawn from the record in the light most favorable to the non-moving party. *Whatley v. CNA Ins. Co.*, 189 F.3d 1310, 1313 (11th Cir. 1999). Once the Court determines that the moving party has met it burden, the burden shifts and the non-moving party must present specific facts showing that there is a genuine issue for trial that precludes summary judgment. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "The evidence presented cannot consist of conclusory allegations, legal conclusions or evidence which would be inadmissible at trial." *Demyan v. Sun Life Assurance Co. of Canada,* 148 F. Supp.2d 1316, 1320 (S.D. Fla. 2001) (citing *Avirgan v. Hull* 932 F.2d 1572, 1577 (11th Cir. 1991)). Failure to show sufficient evidence of any essential element is fatal to the claim and the Court should grant the summary judgment. *Celotex*, 477 U.S. at 322-323. Conversely, if reasonable minds could find genuine issue of material fact then summary judgment should be denied. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1532 (11th Cir. 1992).

DISCUSSION

The Plaintiff's complaint alleges negligence, fraudulent misrepresentation, breach of implied warranty of merchantability, deceptive trade practice, strict liability in tort and money owed for damage to the ships air conditioning unit. The parties have filed cross Motions for Summary Judgment alleging that there are no genuine issues of material fact and that each side is entitled to judgment as a matter of law. The Plaintiff claims are based on his allegations that the Boat was not seaworthy at the time of purchase. The Defendant argues that the vessel was seaworthy and that the Plaintiff suffered neither monetary nor physical damages and therefore all the claims should fail.

(1) Was the Boat Seaworthy?

The Plaintiff argues that defective gear constitutes a breach of the vessel owner's duty to provide a seaworthy ship. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946). The Warranty of Seaworthiness Doctrine is a creation of twentieth century judicial policy concerning risk distribution in the shipping industry and essentially depends on neither common law tort nor contract concepts. *Delome v. Union Barge Kine Co.*, 444 F.2d 225, 230 (11th Cir. 1971). Under general admiralty law, the seaworthiness doctrine simply means that a vessel is reasonably fit for its intended purpose. *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309, 1312 n. 22 (11th Cir. 2003).

The Plaintiff's reliance on *Sieracki* is misplaced. The Supreme Court's ruling in Sieracki has been overuled by subsequent Supreme Court decisions and by statute. *Northern Marine Terminal Co. v. Caputo*, 432 U.S. 249, 261-262, 97 S. Ct. 2348, 53 L.Ed.2d 320 (1977) (eliminating a ship owners

liability for unseaworthiness for injuries to longshoreman caused by a third party under *Sieracki; Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 666 F. Supp. 882, 884 (E.D. La. 1987) (holding the Congress specifically overruled *Sieracki* by statute holding that an injured plaintiff could no longer hold a shipowner liable for injuries caused by transitory defects nor for any unsafe condition caused by a third party). In essence, the doctrine of unseaworthiness applied in *Sieracki* can no longer be used to hold a repairer or employer liable for any unsafe condition under the theory that the employer or owner of the vessel had breached an express or implied warranty of workman like performance to the vessel. *Id.*

The Plaintiff runs down a litany of possible accidents that might have occurred "if" one of the Boat's systems had failed which, in turn, might have caused the ship to be unseaworthy. Therefore, the Plaintiff claims that since the Boat had some defects that might have caused some potential problems he is entitled to summary judgment.

The Plaintiff's assumptions have no legal basis. First, the seaworthiness doctrine does not infer that all errors in the vessel have been eradicated. *Delome*, 444 F.2d at 230. Second, the alleged failures never occurred and all of the potential malfunctions were repaired by the manufacturer without any costs to the Plaintiff. Moreover, the Plaintiff acknowledged that he was able to take pleasure cruises on the boat and thus, the Boat was able to function at its intended purpose. *Delome*, 444 F.2d at 230. Consequently, the Boat was seaworthy under the definition of seaworthiness applied in the Eleventh Circuit.

(2) Plaintiff's Claims of Negligence

The Plaintiff alleges that the Defendant was negligent

because it failed to discover and/or repair the Boat's mechanical problems during the dealer commissioning process. Under Florida law, the elements of a negligence cause of action are: (1) the defendant must have a legal duty to design and manufacture a product reasonable safe for use; (2) the defendant must breach that duty; (3) the plaintiff must suffer an injury legally caused by the breach of that duty; and (4) the plaintiff must have suffered damages. *Indemnity Ins. Co. of North America v. American Aviation, Inc.*, 344 F.3d 1136, 1146 (11th cir. 2003). The Plaintiff must prove all four elements to establish negligence on the part of the Defendant. *Prichett v. E.I. DuPont De Nemours & Co.*, 1994 WL 150834 (M.D. Fla. April 21, 1994). While the Plaintiff claims that the Defendant did not pay for the damages, all of the alleged defects were repaired by the manufacturer at the manufacturer's expense. The Defendant was not required to pay and thus, the Plaintiff has suffered no injury or damages. Consequently, the Plaintiff's charge of negligence fails to meet the standard elements of a negligence action under Florida law. The Plaintiff failed to show sufficient evidence of an essential element of his claim for negligence, as a result, the Court must grant the summary judgment in favor of the Defendant, *Celotex*, 477 U.S. at 322-323.

(3) Plaintiff's Claim of Fraudulent Misrepresentation

In Florida, to prevail on a claim of fraudulent misrepresentation, the Plaintiff must prove: (1) the defendant made a false statement of fact; (2) known by the defendant to be false; (3) made for the purpose of inducing the plaintiff to act in reliance there on; (4) action by the plaintiff in reliance on the statements correctness; and (5) the plaintiff suffered damages or injury. *Wilson v. Danek Medical, Inc.*, 1999 WL 1062129 (M.D. Fla. Mar. 29, 1999). The Plaintiff never establishes that the Defendant purposefully and knowingly

made statements intended to deceive him. Instead, the Plaintiff merely recites a series of problems and subsequent repairs which were paid for by the manufacturer. Any potential damages or injuries were averted by the manufacturer who replaced or repaired any defective parts at its own expense. Accordingly, under Florida law the Plaintiff has not set forth sufficient grounds to establish a claim of fraudulent misrepresentation and summary judgment should be held for the Defendant, *Celotex*, 477 U.S. at 322-323.

(4) Plaintiff's Claim of Breach of Implied Warranty of Merchantability

The Plaintiff asserts that the Defendant breached the implied warranty of merchantability under Florida Statute §672.314 by delivering the Boat with defects. Under Florida law, a warranty whether express or implied is essentially a contract. *Bland v. Freightliner LLC*, 206 F. Supp.2d 1202, 1210 (M.D. Fla. 2002). The elements of a breach of contract action in Florida are: (1) a valid contract; (2) a material breach; and (3) damages. *Id.* The Plaintiff failed to prove an essential element of his claim that the Defendant breached the implied warranty of merchantability because he suffered no injuries. *Marking v. Novarus Pharmaceuticals Corp. Inc.*, 2002 WL 32255405 (S.D. Fla.) holding that to establish a breach of the implied warranty of merchantability the plaintiff must show the product was the proximate cause of their injury).

Moreover, the implied warranty of merchantability states that for goods to be merchantable they must be fit for the ordinary purposes for which such goods are used. Fla. Stat. §672.314(2)(c). No evidence was present to demonstrate that the Boat was not able to fulfill its ordinary purpose as a pleasure boat. In fact, the record shows just the opposite because the Plaintiff was able to take the Boat on several week

long pleasure cruises as well as numerous daily excursions in the Marco Island area. Thus, the Defendant failed to prove an essential element of a claim for breach of implied warranty of merchantability and the Court should grant the summary judgment for the Defendant, *Celotex*, 477 U.S. at 322-323.

(5) Plaintiff's Claim of Deceptive Trade Practices

The Florida Deceptive and Unfair Trade Practices Act (UTPA) provides that a plaintiff may initiate a civil action against a party who has engaged in "[u]nfair methods of competition, unconscionable acts or practices and unfair or deceptive acts in the conduct of any trade or commerce. *Stires v. Carnival Cruise Lines Corp.*, 243 F. Supp. 2d 1313, 1321, M.D. Fla. 2002). In construing what constitutes an unfair practice or deceptive act the Court should give due consideration and great weight to the Federal Trade Commission's (FTC) interpretation of the equivalent federal law. Id. (citing *Kelly v. Nelson, Mullins, Riley & Scarborough*, L.L.P., 2002 WL 598427 (M.D. Fla. Mar. 20, 2002). Claims alleging violations of the Federal Deceptive Trade Practices Act require the heightened pleading requirements of Fed. R. Civ. P.9(b). *Stires*, 243 F. Supp. 2d at 1322. Rule 9 states that "[i]n all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity. Fed. R. Civ. P.9(b).

The Plaintiff alleges that the Defendant committed defective trade practices by failing to honor any of its warranties and did nothing about providing repairs to any of the alleged failures to the Boat's systems. The law states that the Plaintiff must state with particularity the deceptions that induced him to purchase a defective product. *Stires*, 243 F. Supp. 2d at 1322. The express claims or deliberately made implied claims used to induce purchase of the particular

product are presumed to be material to the claim. *Federal Trade Comm'n v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1277 (S.D. Fla. 1999). Yet, the Plaintiff fails to provide a specific instance where the Plaintiff induced him to purchase a defective product without either the Defendant's or the Manufacturer's warranty covering any subsequent repairs. As the record demonstrates, all of the Defendants repairs were made and paid for by either the Manufacturer or the Defendant. Thus, the Plaintiff failed to state with particularity a claim for defective trade practices and summary judgment should be granted for the Defendant, *Celotex*, 477 U.S. at 322-323.

(6) Plaintiff's Claim of Strict Liability in Tort

In Order to obtain summary judgment "the evidence presented cannot consist of conclusory allegations or legal conclusions." *Demyan v. Sun Life Assurance Co. of Canada*, 148 F. Supp. 2d 1316, 1320 (S.D. Fla. 2001) (citing *Avigan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991)). The Plaintiff claims strict liability in torts but puts forth no damages or injuries caused by the Defendant. The Plaintiff has failed to show sufficient evidence of a material element of his claim and thus, the Court should grant summary judgment in favor of the Defendant. *Celotex*, 477 U.S. at 322-323.

(7) Plaintiff's Claim for Money Owed for Air Conditioning Repair

The Plaintiff makes a claim for $1,669.99 for cost to repair rust damage to the Boat's air conditioning unit. The Plaintiff claims that the Defendant is liable for the repair cost because they installed the unit improperly. The Defendant asserts that if the unit rusted it would be the fault of Taylor Made, the units manufacturer and that there was no expert

testimony presented to show that there was a defect caused by the Defendant's actions. Thus, a genuine issue of material fact exists as to the nature of and liability for the rust damages to the Boat's air conditioning unit and summary judgment is not appropriate when there is a genuine issue as to any material fact. Fed. R. Civ. P. 56(c).

(8) Plaintiff's Claim for Damages for Loss of Use

The Plaintiff claims $50,000.00 in damages for loss of use while the boat was out of service for repairs. It is well settled that demurrage (loss of use profits) "will only be allowed when the profits have actually been or may reasonably supposed to have been lost and the amount of such profits is proven with reasonable certainty." *Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.*, 206 F.3d 1373, 1376 (11th Cir. 2000). "It is not the mere fact that a vessel is detained that entitles the owner to demurrage," *Id.* There must be a pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purpose of pleasure. *Id.* Thus, regarding the Plaintiff's claim for loss of use damages "there is no genuine issue as to any material fact" and the Defendant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c).

After reviewing the record and the parties' Cross Motions for Summary Judgment, the Court finds that there is no genuine issue of material fact regarding the Plaintiff's complaint except for the action alleging damages for the $1,669.99 in repair cost for the rusted air conditioning unit. Therefore, the Defendant's Motion for Summary Judgment is due to be granted except for the above noted exception. *Celotex*, 477 U.S. at 322-323.

Accordingly, it is now

ORDERED:

(1) Defendant Island Yachting Management, Inc.'s Motion for Summary Judgment (Doc. # 62-1) is GRANTED in part and DENIED in part. The Defendant's Motion for Summary Judgment as to Plaintiff's claim for Money Owed due to damages to the Boat's air conditioning unit is DENIED. As to all other counts, the Defendant's Motion for Summary Judgment is GRANTED.

(2) Plaintiff DJM Limited's Cross Motion for Summary Judgment and Opposition to Defendant's Motion for Summary (Doc. #64-1) is DENIED.

DONE AND ORDERED at Fort Myers, Florida, this 23rd day of March, 2004.

s/_____
SHERI POLSTER CHAPPELL
UNITED STATES
MAGISTRATE JUDGE

Copies:

Counsel of record
Presiding District Judge
DCCD

CORRECTED

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 04-13420 and No. 04-16441

D.C. Docket No. 02-00617-CV-FTM-SPC

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 17, 2005
THOMAS K. KAHN
CLERK

DJM, LIMITED,

Plaintiff-Appellant,

versus

ISLAND YACHTING MANAGEMENT, INC.
f.k.a. Island Yachting Centre, Inc.,
ISLAND YACHTING CENTRE, LLC,
IAN JARMAN,

Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Florida

(May 17, 2005)

Before TJOFLAT and KRAVITCH, Circuit Judges, and MILLS*, District Judge.

---

* Honorable Richard Mills, United States District Judge for the

Central District of Illinois, sitting by designation.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[5]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 04-13420

District Court Docket No.
02-00617-CV-FTM-SPC

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
May 17, 2005
THOMAS K. KAHN
CLERK

DJM, Limited,

Plaintiff-Appellant,

versus

ISLAND YACHTING MANAGEMENT, INC.
f.k.a. Island Yachting Centre, Inc.,
ISLAND YACHTING CENTRE, LLC,
WILL DITTMER,
IAN JARMAN,

Defendant-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached 11th Cir. R. 36-1 affirmance without opinion included herein by reference, is entered as the judgment of this Court.

Entered:	May 17, 2005
For the Court:	Thomas K. Kahn, Clerk
By:	Jackson, Jarvis

ISSUED AS MANDATE

Jul 06 2005

U.S. COURT OF APPEALS
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-13420-BB

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JUN 24 2005

THOMAS K. KAHN

DJM, LIMITED,

Plaintiff-Appellant,

Versus

ISLAND YACHTING MANAGEMENT, INC.
f.k.a. Island Yachting Centre, Inc.,
ISLAND YACHTING CENTRE, LLC
WILL DITTMER, IAN JARMAN,

Defendant-Appellees.

On Appeal from the United States District Court for the
Middle District of Florida

BEFORE: TJOFLAT and KRAVITCH,M Circuit Judges, and MILLS*, District Judge.

PER CURIAM:

The Petition (a) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

* Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

ISLAND PACKET YACHTS
1979 Wild Acres Road, Largo FL 33771
Dealer Commissioning Checklist

Dealer IYC
Model 320 Hull # 31
Engine 36M Serial # E 24528
Date of Commissioning 11/99

The following is to be used as a basic checklist for the commissioning of your new Island Packet yacht. These guidelines are the minimum suggested by Island Packet Yachts; your actual commissioning procedures may exceed this basic checklist. CHECKLIST MUST BE SIGNED AND RETURNED FOR VALIDATION OF WARRANTY.

All work should be done in accordance with or exceed the recommended practices of the American Boat and Yacht Council standards where applicable, and good marine practices as dictated by the United States Coast Guard or individual component manuals. Because the Commissioning, including matters on this checklist, is to be completed by personnel not in the employ of Island Packet Yachts, the manufacturer shall not be held liable for any omissions or errors involving commissioning the yacht or other modifications to the yacht after delivery to the dealer.

This checklist must be reviewed with the retail customer. A completed Yacht Delivery Report, with dealer and owner signatures, acknowledging this review is also required to validate our manufacturer's warranty.

(I) Upon Delivery to Yard or Dealership
(initials)

s/_____a. Inspect hull and deck for damage.
s/_____b. Verify receipt of all parts and equipment as outlined on Ship Kit List. If a part seems to be missing please look again. Check flaps on boxes etc. If it is signed off it's most probably there.
s/____c. Verify all owner's manuals for OEM equipment are on board.
s/____d. Note damage or discrepancies to driver and Island Packet Yachts.
s/____e. Install lifelines and bow rail as necessary.
s/____f. Add additional coats of Sikkons Cetol to exterior teak as required.

II Before Launching
(initials)

s/____a. Install additional thru-hulls as required for optional equipment.
s/____b. Prep and paint bottom according to paint manufacturers recommendations.
s/____c. Check propeller shaft nuts, cotter pin, zinc, cutlass bearing and propeller for proper installation.
s/____d. Check all seacocks, packing glands and hose clamps for tightness, security. Close all seacocks.
s/____e. Check rudder for free motion, proper operation. Verify general tightness and security of steering system.
s/____f. Check engine fluid levels (transmission, crankcase and fresh water cooling).

III. Launching

(initials)

s/____a. With yacht suspended in slings, but floating,check:
- i. action of all thru hulls/seacocks.
- ii. hose clamps, prop shaft log, rudder stuffing box.
- iii. check all lockers, bilge, for leaks of any kind.

s/____b. Open fuel valve at tank and raw water intake seacock.

s/____c. With DC battery switch on, start engine:
- i. check exhaust for clear water discharge.
- ii. check gauges on engine panel for correct readouts, hour meter operation.
- iii. check alternator output, propeller stuffing box.
- iv. check action of throttle/shift control and cable; stop cable.
- v. inspect cooling system and exhaust system for leaks.

IV Rigging
(initials)

s/____a. Inspect all rigging for defects/kinks or missing parts.

s/____b. Install spreaders and standing rigging on mast. Spreader tips should be padded to protect sails. Tape spreader bases.

s/____c. Check operation of all mast mounted lights and optional equipment.

s/____d. Step mast and install rubber collar and

stainless steel pin at deck partner (requires drilling hole in mast). Caulk areas between mast and mast boot especially at tracks.

s/____e. Tune rig per instructions in Owner's Manual. Follow LOOS gauge recommendations. Secure all turnbuckles, clevis pins and cotter pins so they are "snag free".

s/____f. Install boom. Check operation of all running rigging and halyards, sheets topping lift, outhaul, roller furling systems, etc.

s/____g. Install club boom.

s/____h. Bend on all sails and check for proper shape, size and operation of all control lines. Run main reefing or (opt. furling) system and check operation. Trim reefing lines as necessary.

IV. Plumbing and Electrical Systems

(initials)

s/____a. Check all 12 volt breakers and associated equipment for proper operation. Include bulb checks on cabin, running and anchor lights; check operation of sump pumps in icebox, shower.

s/____b. Check manual and electric bilge pump operation, pressure water system and courtesy light function.

s/____c. Thoroughly flush winterizing material (if applicable) from fresh water system.

s/____d. Fill fuel and water tanks. Bleed air from all hoses and hot water heater. Verify water heater operates under power.

s/____e. Check for proper operation of all 110 volt outlets and accessories, including batter y charger and hot water heater.

s/____f. Check batteries for proper hold down, charge status.

s/____g. Check for appropriate position of Y valve and overboard discharge seacock on head waste system.

s/____h. Check head fill and discharge hose for leaks.

s/____i. Check proper operation of head unit(s).

VI. Stove and Oven
(initials)

s/____a. Review owner's manual supplied with stove and oven.

s/____b. Fill tank with LPG and install.

s/____c. Check all hoses, valves for leaks.

s/____d. Perform ignition test on all burners and oven. Verify proper operation of all stove and oven controls and remote solenoid shut off valve.

VII. Dealer Sea Trial
(initials)

s/____a. Check for proper operation/installation of all equipment.

s/____b. Calibrate electronics as necessary.

s/____c. Check engine alignment. Secure coupling bolts and nuts with Locktite as necessary.

s/____d. Check fit of all doors, drawers and lockers. Adjust to fit, operate smoothly.

s/____e. Water test all ports, hatches, deck hardware and optional equipment installations.

s/____f. Clean yacht thoroughly inside and out before delivery to owner. Add additional coat(s) of Sikkens as needed.

VIII. Owner Sea Trial

(initials)

s/____a. Orient owner to all onboard systems, including factory and dealer installed equipment and associated owner's manuals. Include all electrical, mechanical and plumbing systems.

s/____b. Familiarize owner with engine and basic maintenance/troubleshooting procedures.

s/____c. Locate and assemble emergency tiller and demonstrate its use.

s/____d. Demonstrate use of reefing and furling equipment, proper sail trim and sheet lead angels.

s/____e. Assist owner with motoring skills, particularly backing and close quarters maneuverability.

s/____f. Allow time for questions, concerns and comments from owner. Respond accordingly and in a prompt fashion.

IX I certify that the above commissioning checklist has been completed as outlined (as a minimum) and that a copy of this report has been given to the customer.

s/_____ _____

Authorized Dealer Signature Date

s/_____ _____

Owner Signature Date

2003 U.S. RECREATIONAL BOAT REGISTRATION STATISTICS

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2003 SUMMARY

Responsibility for registering recreational boats in the U.S. falls onto the individual states that annually report their registration data to the U.S. Coast Guard. It is from this data that the 2003 U.S. Recreational Boat Registrations Statistics report is compiled. Other sources used in this report include the U.S. Census Bureau, the U.S. Oceanic and Atmospheric Administration, and Statistical Surveys, Inc.

Boat registration statistics are the basis for allocating Aquatic Resource Trust Fund dollars among the states each year. In addition, NMMA uses the registration data to develop its estimates on annual state dollar sales of new boats, motors, trailers and marine accessories. This information is available in the year-end review of the market.

Overall Changes

In its recent release of state registrations, the U.S. Coast Guard reports there were almost 13 million recreational boats registered with U.S. states and territories in 2003, down 0.5 percent (-59,400 units) from the previous year.

Using data complied by Statistical Surveys, Inc. on new power boat registrations for 46 of the 50 states (representing approximately 94 percent of the marketplace), NMMA estimates there were 382,900 new (model year 2003) power boasts registered by the states during the year. In effect, approximately 314,000 power boats were retired from the recreational boating fleet in 2003.

REGIONAL DIFFERENCES

South Atlantic and Eastern North Central regions switched places for the number one and two regional rankings in 2003. South Atlantic region (Delaware, District of Columbia, Florida, Georgia, Maryland, North and South Carolina, Virginia and West Virginia) usurped the number one spot with 2.558 million boats, Eastern North Central region (Illinois, Indiana, Michigan, Ohio, Wisconsin) follows closely with 2.554 million boats. The two regions account for forty percent boats registered in the country.

One region experienced a significant increase in registrations during 2003 while four showed declines in the number of boats registered.

Region with increases

* Pacific–5.3%

Declining Regions

* New England–(4.5%)

* Western South Central–(4.0%)

* Eastern North Central–(3.6%)

* Mountain–(1.2%)

2003 Regional Boat Registrations

RANKING	1996	1997	1998	1999	2000
New England	510,544	531,243	532,844	542,345	533,198
Middle Atlantic	976,778	1,049,408	1,061,148	1,097,709	1,128,077
South Atlantic	2,308,255	2,338,961	2,377,420	2,435,780	2,452,549
Eastern North Central	2,457,836	2,478,547	2,558,804	2,547,574	2,582,118
Eastern North Central	960,015	983,483	1,011,270	1,034,209	897,045
Western North Central	1,522,210	1,573,102	1,585,591	1,596,203	1,645,785
Western South Central	1,331,167	1,322,625	1,369,565	1,345,882	1,349,518
Mountain	579,270	501,179	623,797	531,942	628,000
Pacific	1,364,480	1,378,606	1,384,254	1,443,515	1,401,099
U.S. Territories	45,412	54,557	57,898	80,450	63,873
Total U.S.	12,056,975	12,309,724	12,565,961	12,735,612	12,782,143

2003 Regional Boat Registrations

RANKING	2001	2002	2003	2003 Rank Order	Percent '03 vs'02	Percent Of Total
New England	545,812	558,925	531,734	9	-4.5%	4.2%
Middle Atlantic	1,092,277	1,096,880	1,060,817	6	-0.5%	8.5%
South Atlantic	2,515,687	2,532,760	2,558,049	1	1.0%	20.0%
Eastern North Central	2,532,406	2,549,531	2,553,799	2	-3.8%	20.0%
Eastern North Central	991,586	398,363	888,780	7	0.3%	7.0%
Western North Central	1,652,527	1,564,539	1,881,312	3	0.2%	13.0%
Western South Central	1,373,190	1,379,019	1,352,132	5	-1.9%	10.5%
Mountain	589,895	591,748	584,525	8	-1.2%	4.6%
Pacific	1,468,447	1,416,677	1,498,759	4	5.3%	11.7%
U.S. Territories	64,539	67,612	89,529	10	2.6%	0.5%
Total U.S.	12,876,346	12,854,054	12,784,816		-0.5%	100.0%